No. 75-894

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH NATALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the trial court's instructions to the jury were inadequate because they omitted an essential element of the offense with which he had been charged and improperly informed the jury that there did not appear to be any dispute in the evidence relating to two additional elements of the offense. He also contends that the court erred in denying his request for the production of a tran-

script of the grand jury testimony of a defense witness.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and co-defendant Frank Russo were convicted of having conspired to collect extensions of credit by extortionate means and of having used extortionate means to collect extensions of credit, in violation of 18 U.S.C. 2 and 894.[1] Petitioner was sentenced to concurrent prison terms of five years on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that Peter Amato, a friend and neighbor of Russo's, was hired in January 1974 as the head bookkeeper of Barbara Creations, Inc., a company engaged in the manufacture of bridal veils. When Barbara Creations developed cash flow problems in late 1974, Amato proposed to the firm's president, Murray Weiss, that he advance the firm some money. Weiss accepted Amato's offer, and Amato loaned Barbara Creations a total of $15,000 during December 1974 and January 1975. Apparently without Weiss's knowledge, Amato borrowed this money from petitioner and Russo at usurious interest rates (Tr. 144-145, 152-153).[2]

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[1] Petitioner and Russo were acquitted of having attempted to obstruct commerce by extortion, in violation of 18 U.S.C. 1951. A third defendant, John Conti, was acquitted on all counts.

[2] Amato told petitioner and Russo that the money he was borrowing would permit him to solidify his position at Barbara Creations, and he apparently intimated that he held an ownership interest in the company (Tr. 137-139). In fact, at the same time he was loaning money to Barbara Creations he was embezzling company funds (Tr. 38-39).

When Amato fell behind on his payments, petitioner and Russo agreed to a series of short extensions, which culminated in petitioner informing Amato that he had until 10:00 a.m. on February 11 to repay the loans (Tr. 155). As Amato was leaving his home to go to work on the morning of February 11, he met Russo, who stated that if Amato failed to meet the 10:00 a.m. deadline petitioner would "just waste you, and not worry about the money at all" (Tr. 157-158). Amato reported this threat to the police and later that day visited petitioner's office, accompanied by a New York City police officer posing as a friend trying to help Amato to raise money to repay the loans. Petitioner warned Amato at that meeting, in the presence of Russo and the police officer, that if Amato kept "giving [him] this kind of story about not paying [him] back * * * then the money won't matter" and that he would "just kill" Amato (Tr. 168). Petitioner also stated at the meeting that if Amato did not repay the loans he would strangle him and, pointing to the police officer, anyone else whom Amato brought to petitioner's office with him (Tr. 273-275).

On February 14, 1975, Amato went again to petitioner's office and met with petitioner, Russo and John Conti. He provided petitioner at that meeting with certain information petitioner had demanded concerning the financial affairs of Barbara Creations

and also paid $3,000 on the loans. Later that day, Russo told Amato that Conti was a "hit man * * * there to size [Amato] up" in the event he failed to repay the loans (Tr. 185). On February 19, Russo visited Amato's home and told Amato that he and petitioner were aware that Amato had lied to them concerning the loans and that if he did not repay them immediately petitioner would come into his home and "do a job" on Amato's wife and children while Amato watched (Tr. 201-202). Agents of the Federal Bureau of Investigation arrested petitioner on February 20, 1975 (Tr. 300-302).

1. Petitioner first contends (Pet. 9-11) that the court's instructions to the jury were inadequate because they omitted an essential element of the offense with which he had been charged. He argues, more specifically, that in order to establish that he had used extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894, the government was required to prove that his threats actually placed Amato in fear of harm and that the court's failure so to instruct the jury requires the reversal of his conviction. This contention is without merit.

The conduct proscribed by 18 U.S.C. 894 is the knowing participation "in the use of any extortionate means * * * to collect or attempt to collect any extension of credit * * *." The phrase "extortionate means" is defined in 18 U.S.C. 891(7) as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of

any person." Thus, to establish that a defendant used extortionate means to collect, or attempt to collect, an extension of credit, the government need only establish (1) that there was principal or interest outstanding on the loans at the time of the conduct charged in the indictment, (2) that the defendant collected, or attempted to collect, such monies, and (3) that the defendant attempted to do so by actual, or express or implied threat of, violence or other criminal means designed to cause harm. The government need not prove, in a prosecution under 18 U.S.C. 894, that the defendant's conduct made his victim fear that he would suffer harm: indeed, a person may be convicted of having violated Section 894 even if the victim testifies at trial that he was not frightened or placed in fear of harm by the defendant's threats.[3] *United States* v. *DeLutro*, 435 F. 2d 255, 256-257 (C.A. 2), certiorari denied, 402 U.S. 983; *United States* v. *Curcio*, 310 F. Supp. 351, 357 (D. Conn.); cf. *United States* v. *Alsop*, 479 F. 2d 65, 67 (C.A. 9); *United States* v. *Epps*, 438 F. 2d 1192, 1193 (C.A. 4).

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[3] In proving that the defendant used an "implicit threat" of violence or other harm to collect an extension of credit, the government may show that the victim was aware that the defendant had employed extortionate means to collect extensions of credit on other occasions. See 18 U.S.C. 894(b). The government did not rely upon evidence of implied threats in the present case, however, because the evidence that petitioner used "actual threats" of violence to collect the loans he had made to Amato was overwhelming.

The construction of Section 894 advanced by petitioner would leave outside the reach of that statute extortionate tactics directed at courageous persons, persons so abruptly and unexpectedly subjected to violence that they were not first placed in fear of harm, and victims of fatal violence whose emotional reactions are not provable because of their deaths. As the court of appeals pointed out (Pet. App. A 31-32; citations and footnotes omitted):

> [T]he evil being attacked [by 18 U.S.C. 894 is] the defendant's conduct. * * * We have no doubt that Congress meant to protect not only the weak and timid from extortionate threats, but the strong and intrepid as well. * * * Accordingly, we reject the claim that actual fear is a necessary element of this offense.[4]

[4] One of the cases principally relied upon by petitioner for the contrary proposition is *United States* v. *DeCarlo*, 458 F.2d 358 (C.A. 3), certiorari denied, 409 U.S. 843. In holding in that case, which involved a prosecution under 18 U.S.C. 892 and 894, that a letter written by the deceased debtor was admissible at trial, the court of appeals stated that "[i]t appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but an essential element to be proved by the Government [citing 18 U.S.C. 891(6)]" (458 F.2d at 367 n. 12). To the extent that the court intended this statement to apply equally to prosecutions under Sections 894 and 892, it confused the elements of an offense under Section 894 with those prescribed under Section 892. The latter section deals only with extortionate extensions of credit and requires that there be an understanding between debtor and creditor at the time the loan is made that the debtor would be harmed if the loan were not repaid. The phrase "extortionate extension of credit" is defined, as the *DeCarlo* court noted, by Section 891(6). But that definition does not apply to Section 894, which deals instead with collections of credit by "extortionate means." As already noted, the phrase "extortionate means" is defined in Section 891(7).

Petitioner's reliance upon *United States* v. *Biondo*, 483 F.2d 635 (C.A. 8), certiorari denied, 415 U.S. 947, is similarly misplaced. *Biondo* involved a prosecution under the Hobbs Act, 18 U.S.C. 1951. In prosecutions under the Hobbs Act, the victim's state of mind has been held to be relevant because of the necessity of showing that the defendant's conduct specifically affected interstate commerce. A particularized showing of an effect on interstate commerce is not required, however, in a prosecution brought under 18 U.S.C. 894. *Perez* v. *United States*, 402 U.S. 146.

2. Petitioner also contends (Pet. 17-19) that the trial court erred in stating in its charge to the jury that there did not appear to be any dispute in the evidence relating to two elements of the substantive offense with which petitioner had been charged.

The elements of the conduct proscribed by 18 U.S.C. 894 referred to by petitioner were discussed by the court in its charge to the jury as follows (Tr. 591):

> One, that from on or about January 1975 until March 18, 1975, Weiss or Amato still owed principal or interest on loans or renewals of loans which had been made to them. In other words, the Government must prove as to the first element that there still was some repayment of principle or interest due on these loans at that time. I don't think there is any dispute in the evidence on that point.
>
> The second element is that the defendant actually collected or attempted to collect all or part of the principle or interest still owed on the loans

> by Weiss or Amato. Again, I don't think there is any dispute in the evidence as to the existence of that element.

Petitioner argues that in making these statements the court invaded the province of the jury in a manner that denied him due process of law and his right to a jury trial. But petitioner did not object to these statements at trial, and he is therefore foreclosed from successfully challenging them on appeal since, even if error, the effect of the statements could readily have been cured had they been objected to in a timely manner. See, *e.g.*, *United States* v. *Mayes*, 512 F. 2d 637, 653 (C.A. 6), certiorari denied, 422 U.S. 1008.

As the court of appeals noted (Pet. App. A 29), moreover, the court in the present case separately and specifically instructed the jury concerning each of the elements of the offense defined by 18 U.S.C. 894 and informed the jurors that in order to find petitioner and his co-defendants guilty the government had to satisfy each of those elements beyond a reasonable doubt. The statement that the court did not think there was any dispute in the evidence relating to two of the elements was not tantamount to a partially directed verdict, particularly since the court instructed the jury on three separate occasions during the charge that it alone had the responsibility for determining the weight, effect and value of the evidence that had been introduced (Tr. 568-569, 571, 601). The court also informed the jury that whether the defendants had attempted to collect their loans to Amato by extortionate means was an issue very much in dispute (Tr. 571).

It is, of course, settled that a trial court may comment upon and summarize the evidence for the jury so long as it does so fairly and in a manner that leaves the ultimate determination of relevant facts to the jury. *E.g.*, *Quercia* v. *United States*, 289 U.S. 466, 469; *Horning* v. *District of Columbia*, 254 U.S. 135, 138; *United States* v. *Tourine*, 428 F. 2d 865, 869 (C.A. 2), certiorari denied *sub nom. Burtman* v. *United States*, 400 U.S. 1020. The court did not abuse that discretion in the present case, but simply stated that petitioner and his co-defendants had apparently loaned money to Amato and had sought to collect that money. In fact, neither petitioner nor his co-defendants disputed that they had made loans to Amato and that they had made efforts to collect on those loans. Rather, they asserted that their dealings with Amato had been entirely legitimate and amicable (see Pet. App. A 30). Thus, the statements challenged by petitioner fairly and accurately summarized the evidence and, when placed in the context of the charge as a whole, were entirely proper.

3. Finally, petitioner contends (Pet. 12-16) that the court erred in denying his request for the production of a transcript of the grand jury testimony of a defense witness. Petitioner argues that this refusal resulted in the possible suppression of exculpatory evidence, in violation of the rule announced by this Court in *Brady* v. *Maryland*, 373 U.S. 83.

Petitioner apparently concedes (Pet. 12 n. 3) that defendants are not entitled to the production of transcripts of the grand jury testimony of defense wit-

nesses under the Jencks Act, 18 U.S.C. 3500.[5] As the court of appeals noted, moreover (Pet. App. A 36):

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence" favorable to the accused. * * * The concept of "suppression" implies that the Government has information in its possession of which the defendant lacks knowledge and which the defendant would benefit from knowing. * * * Here, * * * this essential prerequisite to invocation of the *Brady* rule is lacking. There was no "suppression" involved in the Government's turning over [the defense witness'] grand jury testimony to the trial court for [its] decision on the disclosure motion. Nor were [petitioner and his co-defendants] lacking access to the information which they sought to obtain from the grand jury minutes. * * * [The witness in question] appears to have cooperated fully throughout the trial with [the defense]. They have failed to advance any plausible suggestion of prejudice to them from the jury's [*sic*: court's] ruling, so that we conclude that there has been no suppression whatsoever of any favorable evidence in this case.

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[5] The government's responsibilities under the Jencks Act are limited to the production of the statements of a "Government witness or prospective Government witness * * *." 18 U.S.C. 3500(a). The witness whose grand jury testimony was sought by petitioner and his co-defendants was called by, and his testimony was favorable to, the defense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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